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No._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

LOU RAINES RIFFE, Administratrix
of the Estate of Don C. Riffe,
Petitioner,

v.

INTERNATIONAL HARVESTER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
KENTUCKY

APPENDIX

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Attorneys for Petitioner

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SUPREME COURT OF KENTUCKY

83-SC-492-D
(82-CA-403-MR)

LOU RAINES RIFFE,
ADMINISTRATRIX OF THE
ESTATE OF DON C. RIFFE — MOVANT

v. MARTIN CIRCUIT COURT
#78-CI-197

INTERNATIONAL HARVESTER
COMPANY — RESPONDENT

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83-SC-507-D
(82-CA-403-MR)

INTERNATIONAL HARVESTER
COMPANY — MOVANT

v. MARTIN CIRCUIT COURT
#78-CI-197

PETER CAVE COAL COMPANY,
INC. AND WOLF CREEK
COLLIERIES, INC. — RESPONDENTS

ORDER DENYING MOTIONS FOR DISCRETIONARY REVIEW

The motions of Lou Raines Riffe, Administratrix of the Estate of Don C. Riffe and International Harvester Company for a review of the decision of the Court of Appeals are denied.

The Court of Appeals' opinion is ordered not to be published.

ENTERED October 26, 1983.

_____

Chief Justice

OPNION RENDERED: June 3, 1983; 10:00 a.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

82-CA-403-MR

INTERNATIONAL HARVESTER COMPANY — APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 78-CI-197

LOU RAINES RIFFE, Administratrix of the Estate of Don C. Riffe, Deceased; PETER CAVE COAL COMPANY, INC.; and WOLFE CREEK COLLIERIES, INC. — APPELLEES

REVERSING

* * * * * * * * * * *

BEFORE: HAYES, Chief Judge, HOWERTON, and PAXTON, Judges.

HOWERTON, JUDGE. International Harvester appeals from a judgment entered on a jury verdict in the Martin Circuit Court awarding Lou Raines Riffe, administratrix of the estate of Don Riffe, the sum of $2,103,835.00. The judgment prorated the award on the basis of sixty percent against International Harvester, five percent against Peter Cave Coal Co., and thirty-five percent against Wolf creek Collieries. Peter Cave Coal Co. and Wolf Creek Collieries filed separate appeals, but their appeals were dismissed on motion of International Harvester when the litigants failed to file their briefs and

perfect their appeals.

International Harvester alleges that the trial court erred in failing to grant its motion for a directed verdict, that the verdict was excessive, that the instructions were erroneous, and that the trial court erred in failing to grant its motion to alter, amend, or vacate the verdict. We agree that the trial court erred in denying the motion for a directed verdict, and we reverse the judgment as to International Harvester. We will discuss only the failure to grant the directed verdict.

Don Riffe died when the front end loader he was operating turned over and crushed him. His administratrix alleged that the equipment was defectively

designed in that it lacked a roll over protective structure (ROPS).

The testimony indicated that no company manufacturing end loaders at the time this equipment was built in January 1968 provided a ROPS. Harvester had been developing a ROPS since 1965, but it did not perfect a ROPS design for its end loaders until 1973. It was the first manufacturer in the industry to produce one. Harvester's witnesses testified that the development involved engineering problems regarding material strength, reliability, energy absorption capacity, and a modification of the vehicle's center of gravity. Attachment of the ROPS to an end loader also would reduce visibility and hinder a driver from jumping clear of the equipment in the event of an accident.

The evidence further indicated that there were some "after market" ROPS available in 1968, but the devices had not been proven reliable and were not specifically designed to fit this piece of equipment. There had been instances of accidents where the add-on ROPS had failed, causing even more metal to collapse around a driver.

In 1978, the Kentucky General Assembly enacted KRS 411.310(2) which reads:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at

the time the design was prepared, and the product was manufactured.

The statute provides the dispositive law in the case, and this action presents its first test and application. The statute creates a presumption that the end loader was not defective if "the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured." (Emphasis added.) The statute creates a presumption in favor of the manufacturer based on compliance with industry standards, even if those standards do not conform to the current state of the art. In II Frumer-Friedman, *Products Liability*, Sec. 16A[4] [i], p. 3B-176.2, (1980) we read:

Kentucky's Products Liability Act . . . creates a

rebuttable presumption that a product is not defective if its design, manufacture and testing standards conformed to either the state of the art in existence at the time the product was designed and manufactured or "generally recognized and prevailing standards" in the industry at that time. Thus, the Kentucky presumption is tied to an industry's acceptance of advances in the state of the art.

The Kentucky statute was passed after the trial in *Nichols v. Union Underwear Co., Inc.*, Ky., 602 S.W.2d 429 (1980). In *Nichols* the court stated that several factors, including deviation from an industry standard,

should be presented to the jury to determine whether a product is unreasonably dangerous. If the law *Nichols* established in products liability cases was the law in Kentucky, we would probably be compelled to uphold the trial court in its denial of a directed verdict and in its instructions. *Nichols* is not dispositive, however, because of the action taken by the legislature in adopting KRS 411.310(2).

The legislature's creation of the presumption reflects a concern for the rising tide of plaintiff's verdicts in defective design claims and is an attempt to define a standard of care to which a manufacturer may be held in products liability cases. Conformity with industry standards or the

state of the art should prevent one from being held liable for defective design, but if a preponderance of the evidence indicates that an industry has adopted careless standards, liability may be imposed. Once a manufacturer establishes the presumption of a non-defective design by specific proof of conformity with industry standards or the state of the art, a plaintiff can only overcome the presumption by a preponderance of the specific evidence to the contrary. Only then is there a question for a jury to decide. The legislature obviously did not intend to allow a jury to find a manufacturer liable after a plaintiff submitted only a minimum of general evidence.

International Harvester's evidence established that the design, method of manufacture, and testing of the end

loader conformed to the generally recognized and prevailing industry standards in 1968. The presumption that the design was not defective was, therefore, established. Riffe's efforts to rebut the presumption came from the testimony of two witnesses. The testimony, however, merely consisted of ultimate legal conclusions that the end loader was unreasonably dangerous and that the industry could have developed a ROPS by 1968. Neither witness gave any specifications for his theoretical ROPS design, nor did he give any specific facts which, presumably led to his opinion. We have carefully reviewed the testimony, and it does not meet, much less preponderate against, Harvester's specific evidence detailing why it had not yet produced a ROPS in 1968.

Riffe also argues that additional evidence existed indicating that California and the Corps of Engineers required ROPS on end loaders at the time in question. This evidence came from less than unequivocal statements by the witnesses and can scarcely be said to establish the "generally recognized and prevailing standards" in the industry. Both witnesses acknowledged that in 1968 there were no industry standards, no design, no method of manufacture, and no testing for ROPS in the entire heavy equipment industry.

Similar evidence was held "valueless" and "of the rankest speculation" in *Cox v. General Motors Corp.*, Ky., 514 S.W.2d 197 (1974). The court affirmed a directed

verdict for the automobile manufacturer. *See also, Ford Motor Co. v. McCamish*, Ky. App., 55 S.W.2d 507 (1977), and *Singleton v. International Harvester Co.*, 685 F.2d 112 (4th Cir. 1981). We note that one of Singleton's expert witnesses was also an expert witness for Riffe.

We can only conclude that KRS 411.310(2) creates a presumption that a manufacturer is not laible for defective design if his product generally conforms to industry standards or to the current state of the art in the development of such products. The evidence clearly showed that the end loader complied with industry standards at the time of its manufacture in 1968, and the testimony of Riffe's expert witnesses was insufficient to overcome the presumption and allow the case to be decided by a jury.

The trial court erred in denying International Harvester's motion for a directed verdict, and the judgment is reversed. The Martin Circuit Court is directed to enter a new judgment dismissing the claim against International Harvester.

ALL CONCUR.

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KENTUCKY REVISED STATUES 411.310(2)

(2) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured. (Enact. Act 1978, ch. 91, Sec.3, effective June 17, 1978.)

SUPREME COURT OF KENTUCKY

NO. 83-SC-492-D

LOU RAINES RIFFE,
Administratrix of the
Estate of Don C. Riffe — Movant

vs. MOTION FOR DISCRETIONARY REVIEW

INTERNATIONAL HARVESTER
COMPANY — RESPONDENT

FILED

Jun 22, 1983

John C. Scott,
Clerk
Supreme Court

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I certify that a copy of this Motion was served upon the Resondent and the Clerk of the Court of Appeals by mailing a copy thereof to Charles Landrum, Jr., Esq., Suite 201, Security Trust Building, Lexington, Kentucky 40507; and Hon. John C. Scott, Clerk of the Kentucky Court of Appeals, Bush Building, 403 Wapping Street, Frankfort, Kentucky 40601; on this the 21st day of June, 1983.

PETER PERLMAN
ATTORNEY FOR MOVANT

SUPREME COURT OF KENTUCKY

No._____

LOU RAINES RIFFE,
Administratrix of the
Estate of DON C. RIFFE — MOVANT

vs. MOTION FOR DISCRETIONARY REVIEW

INTERNATIONAL HARVESTER
COMPANY — RESPONDENT

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MAY IT PLEASE THE COURT

Comes the Movant, Lou Raines Riffe, Administratrix of the Estate of Don C. Riffe, and respectfully moves the Court to review a decision rendered by the Kentucky Court of Appeals on June 3, 1983, which reversed a judgment of the Martin Circuit Court. (Appendix I).

a. The Movant is Lou Raines Riffe, Administratrix of

the Estate of Don C. Riffe, deceased, who is represented by Peter Perlman, Perlman & Garmer, P.S.C., 388 South Broadway, Lexington, Kentucky.

The Respondent is International Harvester Company, who is represented by Charles Landrum, Jr., Suite 201, Security Trust Building, Lexington, Kentucky.

b. The date of final disposition of this matter by the Kentucky Court of Appeals is June 3, 1983. (Appendix II).

c. A supersedeas bond was executed by the Respondent International Harvester Company after entry against it of a judgment by the trial court in accordance with a jury verdict.

I. INTRODUCTION

This is a products liability case arising out of the death of a 38-year-old coal mine equipment operator who was crushed by a front endloader manufactured in 1968 by the International Harvester Company. The Movant's theory was one of defective design by reason of the absence of a rollover protective structure (ROPS) on the endloader. The jury returned a verdict in Movant's behalf in the some of $2,103.835.

II. STATEMENT OF MATERIAL FACTS

A. Evidence Relating to the Occurrence

On February 8, 1978, Don Riffe was operating an International Harvester H-65C front endloader on a haulage road between the mining properties of the Peter

Cave Company and Wolfe Creek Collieries, in Martin County, Kentucky.

A witness saw the loader climb the haulage road with its bucket forward, and noticed that it suddenly came back down the hill, out of control, and off a bank on the left side of the road and turned over.

A biomechanical engineer, Dr. Vern L. Roberts, testified that the loader rolled only 3/4 of a turn, and that ROPS would prevent serious injury from a rollover of one full turn or less.

Earlier on the same day that Don Riffe was killed, other employees of Wolfe Creek and Peter Cave had experienced problems with the endloader's brakes and fuel. The brake pressure had failed and the engine was

"dying out." There was no evidence that Don Riffe was aware of these problems. The official cause of death was a "crushed chest."

Dr. Roberts and David MacCollum, a safety engineer, testified that Mr. Riffe would have survived the rollover if ROPS had been furnished. Mr. MacCollum concluded that "he would have walked away." Harvester's product integrity engineer, Roland F. Hughes, admitted that the environmental cab furnished as an integral part of the loader in place of the ROPS "wouldn't have supported anything in a rollover" and "the chance of somebody getting badly hurt or killed were good."

According to Mr. MacCollum, the front endloader's propensity to roll over had been recognized since the

1940's. This was the result of its large rubber tires, high center of gravity, and articulating feature.

Mr. Hughes testified that a ROPS unit serves two purposes:

(1) To inhibit rollover;

(2) To furnish operator protection.

Mr. Riffe's use of the loader conformed to its design and expected use. Harvester's expert, Mr. Hughes, felt that engine failure caused the loader to stop climbing and to lose its steering ability. He admitted that a rollover was foreseeable and in fact probable under the environment of its use. No expert witness disputed the known foreseeability of a rollover under similar conditions and no one attributed any negligent or improper conduct to Don Riffe. When a rollover occurs, the operator has no second chance without ROPS.

The evidence that it was best from a cost and technological standpoint to have ROPS installed by the manufacturer at the time of initial production was undisputed. The cost of a ROPS unit in 1968 was $1,000 to $2,000, as contrasted with the cost of the endloader of $60,000.00.

B. Evidence Relating to Availability of Rollover Protection (ROPS)

International Harvester advanced many theories in supoprt of its position that the judgment should be reversed. The only issue addressed by the Court of Appeals was its interpretation of KRS 411.310(2). It found

that the presumption in favor of the manufacturer had not been rebutted despite the jury and trial court's finding to the contrary.

At the trial, Harvester's expert engineer, Mr. Hughes, admitted that at the time this loader was manufactured, it was "generally knowledgeable throughout the industry that ROPS were available."

The following additional evidence was presented to the jury on this issue:

1. In 1968 and before, at least ten auxiliary equipment manufacturers were producing ROPS for use on front endloaders.

2. In 1968 and before, Harvester obtained ROPS units from auxiliary equipment manufacturers, incorporated these into their endloaders, and

thereafter sold the integrated unit at a profit as an International Harvester product. (Evidence presented through Roland Hughes, Harvester's engineer.)

3. In 1968 and before, there were some 33 different regulations requiring ROPS on front endloaders.

4. Before 1968, ROPS on all front endloaders were required by the state of California.

5. Before 1968, ROPS on all front endloaders were required by the U.S. Army Corps of Engineers.

6. Before 1968, ROPS on all front endloaders were required by the U.S. Bureau of Reclamation.

7. In 1958, the Portland, Oregon district of the North Division of the U.S. Army Corps of Engineers adopted a specification requiring ROPS on front endloaders. This was done after ROPS were field tested and found effective.

8. Harvester's recognition in the early 1960's of the need for ROPS was demonstrated by its "ROPS Compliance Guide" (1973):

> The rapidly growing need for ROPS was recognized by International Harvester in the early 1960's. Significant development work commenced in 1965, many years before ROPS were a legal requirement. (emphasis added)

9. Harvester had field tested ROPS for front endloaders for "many years" before 1968 but didn't attch them as part of basic design because they were unable to develop one that was adequate to "do the job." (Evidence presented through Roland Hughes.) "The job" referred to would be operator protection. Their design decision was to off no operator protection.

10. Before 1968, Harvester was aware of the regulations adopted by the U.S. Army Corps of Engineers requiring ROPS on front endloaders. (Evidence presented through Roland Hughes.)

11. In 1958, Harvester's predecessor, Frank G. Hough Co., developed a prototype assembly report for the attachment of an "overhead guard kit" on a front endloader. Its purpose was to prevent intrusion into the operator's zone of comfort. (Evidence presented through Roland Hughes.)

This evidence was characterized by the Court of Appeals as a "minimum of general evidence."

Less than two months before the trial, International Harvester submitted a "Pre-Trial Memorandum and

Brief in Support of Motion for Summary Judgment." In its Memorandum, Harvester stated "the technology of how to put a ROPS on an endloader was known, and was available to a customer by special order." This recognition by Harvester of the existing technology is a judicial admission. *Harlow v. Harlow*, 551 S.W.2d 230 (Ky. 1977).

In suport of its position, Harvester submitted the case of *Biss v. Tenneco*, 409 N.Y.S.2d 874 (1978), which it suggested fit this case "like a screen door." In the *Biss* case, it was found that the manufacturer had fulfilled its duty when it advised the purchaser that ROPS were available. The decision turned on the "election" of the purchaser to obtain the ROPS unit as an available option.

Various catalogues and sales brochures issued by Harvester in 1968 and before were introduced by Plaintiff and showed that no reference was made in any document to the availability of a ROPS unit as an option, accessory, or special order. This evidence was presented in response to Harvester's claim that the purchaser had "elected" to buy a loader without ROPS. Following the presentation of this evidence, Harvester abandoned this argument.

Harvester introduced evidence that in 1968, there were some seven front endloader manufacturers, none of whom offered ROPS as an integral part of the loader. The fact that ROPS were ever furnished is due only to the mandate issued in 1974 by the federal government

requiring their use by coal mine operators. 30 C.F.R. Sec. 77.403(A). By coincidence, Harvester's ROPS design was perfected just in time to comply with this regulation and Harvester was quick to promote its leadership in ROPS development through its 1973 "Compliance Guide."

Despite its recognition of the need for ROPS on front endloaders, and its desire to minimize injuries in rollovers, Harvester is to this day producing and selling front endloaders without ROPS to foreign markets. Its decision is totally based on economics. If ROPS are not mandated, they are not furnished. (Evidence presented through Roland Hughes.)

Dr. Roberts' evidence explained the ROPS concept to the jury. It is "basically a steel cage that encloses the operator's compartment." He further testified:

It's usually made out of pipe and you have bars come up at each corner and they're tied together at the top and there are usually some additional braces at the top.

According to Dr. Roberts, the guideline for determining the structural integrity of a ROPS unit for this loader was the following:

A. Well, actually it's twice the weight of the vehicle but you want to have at least the weight of the vehicle so if it's sitting on its roof and the whole weight of the vehicle is pushing down on that ROPS you won't have any crushing, you won't have the crushing action and pinning the individual between the machine and the ground.

Q. 71. I believe that Mr. Hughes in his deposition estimated the weight of this vehicle at twenty six thousand pounds, so what would be the structural integrity

of a properly designed ROPS unit?

A. About fifty thousand pounds.

Q. 72. Who is in a better position to furnish a rollover protective structure?

A. It's my opinion, Mr. Perlman that the manufacturer has the greatest amount of engineering work to design a ROPS. He's the man who knows what the vehicle can stand, he knows where he has his chassis, he knows the strength of his machine, or he should and he, in my opinion, is the individual who is in the best position to design a rollover protective structure that's best suited to his machine.

The following testimony was developed by Harvester's counsel upon cross-examination of Dr. Roberts:

Q. 9. As a safety engineer would you agree that the use of an improper design or inadequate ROPS may create a greater hazard to the operator?

A. I don't think there could have been any greater hazard than what he [Don Riffe) had. A ROPS which might not be strong enough would inevitably have to be stronger than that cab.

In addition, Dr. Roberts and Mr. MacCollum, testified that ROPS on front endloaders were known, available, and actually in use before 1968 without significantly affecting either the cost or function; that the manufacturer was in the best position to equip the front end-loader with a ROPS unit; and the technology was well-known at that time to do so. Not even Harvester questioned this evidence.

III. QUESTIONS OF LAW INVOLVED

A. WHETHER THE COURT OF APPEALS PROPERLY INTERPRETED KENTUCKY'S PRODUCT LIABILITY ACT.

1. Interpretation of KRS 411.310(2)

The Court of Appeals' decision is the first appellate opinion interpreting Kentucky's Product Liability Act, KRS 411.300, *et seq.* Specifically, the Court of Appeals dealt with the application of KRS 411.310(2) which provides:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

The position taken by the Court of Appeals was:

> The statute creates a presumption in favor of the manufacturer based on compliance with industry standards, *even if* those standards *do not* conform to the current state of the art. (emphasis added)

(Opinion, p. 3-4)

This is contrary on its face to the express language of the statute which allows the presumption to be overcome by a preponderance of evidence showing that the product failed to comply *either* with:

a) Prevailing standards, *or*

b) The "state of the art."

Under the Court of Appeals' interpretation, a manufacturer is relieved by simply showing it complied with industry practice or standards *even if* such standards *do not conform* to the current "state of the art."

Such a narrow interpretation allows an industry to set its own safety standards, and abandons the power of the courts and legislature to regulate and control consumer safety. This represents a complete and total departure from previous law in Kentucky as represented by the case of *Herme v. Tway Co.*, Ky. 294 S.W.2d 534 (1956); *Jones v. Hutchinson Mfg.*, Ky. 502 S.W.2d 66 (1973); and *Nichols v. Union Underwear Co.*, 602 S.W 2d 429 (Ky., 1980).

In *Nichols*, the Kentucky Supreme Court held that the ultimate issue for the jury in a design case is:

> Whether the manufacturer that placed in commerce the product made according to an intended design acted prudently.

Id., at 33.

2. *Definition of "State of the Art"* Both *Jones* and *Herme, supra*, held that conformity with industry

practice does not establish compliance with the "state of the art" and will not shield a manufacturer from liability.

In *Nichols, supra,* it was shown that the t-shirt in question complied with applicable standards for flammability. The Court held that this was only one of the factors to be considered by a jury in determining whether the product was unreasonably dangerous. The following observation was expressed by Justice Stephens in the *Nichols* opinion:

> Probably the main difference between design defects and construction flaws is that with respect to design defects the feasibility of making a safer product is usually in issue, while feasibility is not generally an issue for construction flaws.

Id., at 433.

Harvester's claim is that it complied with industry standards. In fact, there were no industry standards. Had it made any effort to design a protective structure for a foreseeable rollover, it might be appropriate then to view their design in comparison with an alternative. However, their conscious choice was to make no design at all. In *Nichols, supra,* the Kentucky Supreme Court applied a risk-balancing test to determine the defective nature of a product. Under this test, consideration is given to technologically and economically available and feasible methods of producing the product in a safer fashion. One of the factors considered is industry practice, and another is "state of the art." This is consistent with the presumption in KRS 411.310(2).

"State of the art" has been defined in the following manner:

> The technological environment at the time of manufacture. This technological environment includes the scientific knowledge, economic feasibility, and the practicalities of implementation when the product was manufactured.

Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 748 (Tex. 1980).

Mere compliance with industry practice is not *equivalent* to compliance with the "state of the art." To hold otherwise would allow a handful of manufacturers to ignore known and available safety measures. Certainly this cannot be the law in Kentucky.

Consistency with industry practices has never been conclusive in either strict liability or negligence actions.

Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977); *The T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1932); Phillips, "The Standard for Determining Defectiveness in Products Liability," 46 U.Cinn. L.Rev. 101 (1977).

In the *T.J. Hooper* case, *supra*, Judge Learned Hand addressed industry custom, and stated:

> A whole calling may have unduly lagged in the adoption of safety devices . . . Courts must in the end say what is required.

In this case, as in *Hooper, supra*, a handful of manufacturers unilaterally decided to withhold a protective measure from the public.

The Court of Appeals' opinion admits that its interpretation is contrary to the law as expressed in the *Nichols* case. It justifies its decision by announcing that

Nichols is no longer dispositive and was pre-empted by KRS 411.310(2).

The Court of Appeals misapplied and misinterpreting both the Court's holding in the *Nichols* case and KRS 411.310(2). Reversal by the Supreme Court is essential.

B. WHETHER THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OPINION FOR THE JURY'S FINDINGS OF FACT.

The Court of Appeals specifically found that the trial court erred in denying Harvester's motion for a directed verdict. In so doing, the Court of Appeals overlooked the well-established principle of law that a reviewing court must view the evidence in the light most favorable to the party for whom the jury has found, and to give that party the benefit of all reasonable inferences from the evidence. In addition, the reviewing court must accept the evidence of plaintiff's witnesses as true for purposes

of this motion. *Cassinelli v. Begley*, Ky., 433 S.W.2d 651 (1968); *Peterman v. Darby*, Ky., 419 S.W.2d 747 (1967).

In summarizing the evidence, the Court of Appeals reviewed it in a light most favorable to the manufacturer, and virtually ignored plaintiff's proof. Rather than looking for consistency between the jury's verdict and the evidence as presented, the Court of Appeals decided to toally disregard such evidence.

The Court of Appeals' opinion does not even mention:

1. The admission by Harvester's engineer that in 1968 the availability of ROPS was "generally knowledgeable throughout the industry";

2. The fact that Harvester obtained ROPS units in 1968 and installed them on its own front endloaders;

3. Harvester's compliance guide which recognized the growing need for ROPS by Harvester in the early 1960's;

4. Harvester's admission that it had tested ROPS for front endloaders for many years before 1968.

The Court of Appeals rejects the evidence that the state of California and the U.S. Army Corps of Engineers required ROPS on all front endloaders because in the Court's view such evidence "came from less than unequivocal statements."

It acknowledges the evidence relating to the availability of "after-market" ROPS in 1968, but accepts Harvester's partisan view that such devices had not been proven reliable. The Court of Appeals makes reference to "instances of accidents where the add-on ROPS had failed." This demonstrates an additional reason that ROPS should have been included by the manufacturer as an integral part of basic design.

Similar evidence as that rejected by the Court of Appeals was considered by the Supreme Court of Alaska in the case of *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871

(Alaska 1979) which involved a front endloader, and facts very similar to the present case. In *Beck*, the Court dealt with a 1964 front endloader as compared to the 1968 loader in this case.

The Alaska Supreme Court discusses the 1960 regulation of the U.S. Army Corps of Engineers and the 1965 regulation of the state of California, and the availability of ROPS from auxiliary equipment manufacturers. The Court had no difficulty in concluding that this evidence supported a finding that the endloader was defective in design by reason of the absence of ROPS.

The Alaska court found that *ROPS were available, feasible,* and *cost effective* in the 1950's, and at the time of the design (late 1950's) and production (1964) of the front endloader, and that the manufacturer "made a *deliberate*

decision not to install any kind of protective canopy whatsoever on the 944 as part of its basic design." The manufacturer (Caterpillar) in *Beck*, made the same argument that Harvester makes in this case and the Court disposed of this argument in the following manner:

> Comparison with similar products . . . would be improper if used as the definitive test for ascertaining a defect.

Id., at 881.

The same evidence was also presented in *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854 (Ala. 1981) which concerned a rollover at a strip mine of a DH8 tractor manufactured in 1970. ROPS were not furnished as part of basic design. The Alabama Supreme Court considered the evidence which included the regulations of the U.S. Army Corps of Engineers and the state of California which required ROPS on heavy equipment (including front endloaders). The Court concluded:

> The jury could have found under the evidence that the state of the art at the time the tractor here was sold dictated the inclusion of some type of rollover device.

Ford at 858

Alabama's wrongful death statute allows damages in such amount as will punish the tortfeasor and "deter him and others." The evidence was found sufficient to support an award under this statute.

Kentucky's Court of Appeals found that the same evidence did not create an issue of fact for the jury. This finding is clearly erroneous and should be set aside.

In its opinion, the Kentucky Court of Appeals does not even attempt to distinguish either the *Beck*, or *Ford* case. Instead, it chose to accept the authority submitted by

by Harvester, *Singleton v. International Harvester Co.*, 685 F.2d 112 (4th Cir. 1981). As an aside, the Court of Appeals notes that one of Singleton's experts was also an expert witness for Riffe.

In Singleton, a 1948 farm tractor rolled into a muddy spot, became immobilized, and flipped over. There is no similarity in either the facts or the product between the present case and the *Singleton* case. Some of the basic differences between a front endloader and a tractor include the loader's articulation feature, its ability to jackknife and roll over, its use on hills, its large tires and high center of gravity, and its multi-purpose uses. The Court found that there was a failure to show a safer tractor design that was available in 1948.

The evidence should have been viewed in its most favorable light and from the perspective of whether it

would have been unreasonable for the jury to find for the Plaintiff. *Perkins v. Trailco Mfg. Sales*, Ky., 613 S.W.2d 855 (1981). Instead, the Court of Appeals scrutinized and criticized the quality of proof and seemed intent on finding a reason to reverse the verdict.

A recent Sixth Circuit opinion applying Kentucky law discussed the responsibility of the trial judge in considering a Motion for Judgment N.O.V. *Pike v. Benchmaster Mfg. Co.* (decided Dec. 17, 1982, No. 80-5473) (6th Cir. 1982).

The Court stated:

> Thus, if there is sufficient evidence to raise a question of fact for the jury, JNOV is improper. In determining whether the evidence is sufficient, the trial court may neither weight the evidence, pass on the credibility of

witnesses nor substitute its judgment for that of the jury. In deciding the motion, the trial court must view the evidence in a light most favorable to the part against whom the motion is made, drawing from that evidence all reasonable inferences in its favor.

In contrast, the Court of Appeals weighed the evidence, passed on the credibility of witnesses, and substituted its judgment for that of the jury.

C. WHETHER THE COURT OF APPEALS' OPINION ENCOURAGES MISDESIGN IN DEFECTIVE DESIGN CASES.

The Court of Appeals' opinion makes the following policy statement about defective design claims:

The legislature's creation of the presumption reflects a concern for the rising tide of plaintiff's verdicts in defective design claims.

(Opinion, p. 4)

Although no documentation is furnished in support of such a "rising tide," the Court's opinion is an obvious attempt to stem such litigation, now and in the future.

Such an approach totally frustrates the purposes upon which strict liability as expressed by Restatement Section 402 (A) was conceived. These purposes include placing the risk of injury on the person or corporation:

1) Who puts a product in the stream of commerce;

2) Who is most able to distribute the cost;

3) Who is in the best position to perceive, appreciate and avoid the product's danger; and

4) Who is or ought to be aware of the real cost of the product and viable alternatives.

These goals have been recognized in Kentucky. *Embs v. Pepsi Cola Bottling Co. of Lexington*, Ky., 528 S.W.2d 703 (1975).

Don Riffe had nothing to do with the design, sale or distribution of the product; he was neither contributorily negligent, nor did he appreciate any risks in connection with the use of the product. Harvester and the Court of Appeals would have him and his estate suffer the entire burden.

In the recent case of *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568 (Ohio 1981), Ohio's Supreme Court discussed the evolution of the strict liability concept:

> The doctrine of strict liability evolved to place liability on the party primarily responsibile for the injury occurring, that is, the manufacturer of the defective product.

Greenman v. Yuba Power Products, Inc. (1963), 59 Ca.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897. Any distinction based upon the source of the defect undermines the policy underlying the doctrine that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm.

As the Court observed in *Nichols, supra,* in design defect cases, the defect is an unreasonably dangerous design; actual knowledge is not the question. The design of the front endloader was defective and unreasonably dangerous. The jury heard the evidence and so found. The trial court agreed with the jury verdict. To reverse

such a finding would be a gross abuse of discretion and would invite the misdesign of products with little or no regard for their injury potential. Hopefully, this is not the law in Kentucky.

IV. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED AND REVERSED FOR THE FOLLOWING REASONS.

1. The Court improperly interpreted Kentucky's Product Liability Act and reached a result totally inconsistent with the Kentucky law of Product Liability;

2. The Court improperly interpreted, distinguished, and overruled *Nichols v. Union Underwear;*

3. The Court of Appeals improperly substituted its opinion for the jury's finding of fact;

4. The court set a precedent which is consistent with harsh and irrational results and encourages the misdesign of products;

5. The Court's Opinion violates the fundamental purposes and goals of strict liability.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals is erroneous and unjust. Movant respectfully moves the Court to exercise its power of discretionary review and to right the wrongs which have been committed.

Respectfully Submitted,

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